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NO. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,
Petitioners

v.

ARDITH McPHERSON,
Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' BRIEF ON THE MERITS

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PETITIONERS' BRIEF ON THE MERITS

RULE 34(a) COMPLIANCE

QUESTIONS PRESENTED FOR REVIEW

1. Does a Deputy Constable serving at the pleasure of the Constable have a constitutional right to speak out favoring the assassination of the President of the United States?

2. Does a law enforcement officer have a constitutional right to speak out in favor of violations of the law the officer has undertaken to enforce?

RULE 34(b) COMPLIANCE

PARTIES TO THIS PROCEEDING

PLAINTIFF

Ardith S. McPherson
Attorney Annie S. Garcy
Attorney Bruce V. Griffiths

DEFENDANT

Constable Walter H. Rankin

Harris County Commissioners Court
County Judge Jon Lindsay
County Commissioner El Franco Lee
County Commissioner Jim Fonteno
County Commissioner Bob Eckels
County Commissioner E. A. Lyons, Jr.
County Attorney Mike Driscoll
Assistant County Attorney Billy E. Lee

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RULE 34(d) COMPLIANCE

CITATIONS TO JUDGMENTS BELOW

1. District Court Judgment, April 15, 1983—Record, Document No. 24; Joint Appendix, 34; not published.
2. Court of Appeals Opinion, July 12, 1984—Record, Document No. 30; Joint Appendix, 44; published at 736 F.2d 175.
3. District Court Judgment, February 4, 1985—Record, Document No. 38; Joint Appendix, 122; not published.
4. Court of Appeals Opinion, March 19, 1986; Record, Document No. 44; Joint Appendix, 123; published at 786 F.2d 1233.

RULE 34(e) COMPLIANCE

JURISDICTIONAL GROUNDS AND TIME FACTORS

(i) 28 U.S.C. § 1201(c) authorizes this appeal.

(ii) Plaintiff alleged jurisdiction in her petition under the First and Fourteenth Amendments to the Constitution, and under 42 U.S.C. §§ 1983 and 1988, as well as under 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. §§ 2201 and 2202. The Constable did not challenge any of those jurisdictional allegations in the Trial Court, in the Court of Appeals, nor does he do so in this Court.

(iii) the opinion of the Court of Appeals was entered on March 19, 1986.

(iv) No rehearing was requested.

(v) Petition for Writ of Certiorari was filed June 17, 1986.

(vi) Certiorari was granted October 20, 1986.

RULE 34(f) COMPLIANCE

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article XVI, § 1, Constitution of Texas

§ 1. Official Oath

Section 1. Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or the confirmation thereof. So help me God."

Article 6869, Vernon's Texas Civil Statutes

Art. 6869. [7125] [4896] May Appoint deputies, etc.

Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of their principals; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the official oath, which shall be indorsed on his appointment, together with the certificate of the officer administering the same; and such appointment and oath shall be recorded in the office of the County Clerk and deposited in said office. The number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the Justice precinct in which is located the county site of such county, and one in each Justice precinct, and a list of these appointments shall be posted up in a conspicuous place in the Clerk's office. An indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff. Provided further, that if in the opinion of the Commissioners' Court fees of the sheriff's office are not sufficient to justify the payment of salaries of such deputies, the Commissioners' Court shall have the power to pay the same out of the General Fund of said county.

Article 6879a, Vernon's Texas Civil Statutes

Art. 6879a. Appointment of Deputies

Section 1. The duly elected Constable in each Justice Precinct may appoint Deputies in accordance with the provisions of Section 2 of this Act, and each and every instance said Deputy Constables shall qualify as required of Deputy Sheriffs.

Sec. 2. When the Constable in each and every instance named and described in the preceding section of this Act shall desire to make appointment of a Deputy or Deputies, as the case may be, said Constable shall first make written application to the Commissioners' Court of his County showing that it is necessary for such Constable to have the Deputy or Deputies requested in order to properly handle the business of his office originating in the Precinct in which such Constable has been elected, giving the name of each proposed appointee; and if the Commissioners' Court shall find that the Constable is in need of the Deputy or Deputies requested to handle the business originating in his Precinct, then and in that event, and in that event only, the Commissioners' Court shall approve and confirm the appointment of the Deputy or Deputies provided by this Act.

Sec. 3. Any person who serves as a Deputy Constable without the provisions hereof having been complied with relative to his appointment or any Constable who issues a Deputyship without the consent and approval of the Commissioners' Court shall be fined not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1,000.00).

Article 6879b, Vernon's Texas Civil Statutes

Art. 6879b. Responsible for Deputies' Acts

Constables shall be responsible for the official acts of their deputies, and they shall have power to require from their deputies bond and security; and they shall have the same remedies against their deputies and the sureties of said deputies as any person can have against a constable and his sureties.

RULE 34(g) COMPLIANCE

STATEMENT OF THE CASE

On January 12, 1981, Constable Rankin appointed Ardith McPherson his Deputy Constable. Appointments are probational for a 90 day period, during which the appointing officer and the appointee may each determine if this is a satisfactory relationship that they desire to continue indefinitely. On March 30, 1981, prior to the expiration of the probation period, an attempted assassination was committed on President Reagan. A radio in the work area where McPherson was assigned carried a news report of the attempt, adding that the President had been hastened away in apparently uninjured condition. McPherson had lunched earlier and was working her computer. She told a fellow Deputy working with her: "I hope that if they go for him again, they get him." (J. A. 12; R. Document 1). Some other Deputies in her work area either did not hear or paid no attention to her comment, but one, Captain LeVrier, did hear and confronted her with whether she meant what she said. At both trials, Captain LeVrier testified that she said she did mean it. At both trials, McPherson denies that she

said anything to her superior's question, but just smiled at him. Captain LeVrier reported the incident to his superior, Captain Riley, who then reported it to Constable Rankin. The Constable questioned Captain LeVrier, then summoned McPherson to his office. At both trials the Constable testified that she admitted making the statement and that she meant it. At both trials, McPherson admitted that she said the statement, but denied that she meant it.

Constable Rankin testified (J. A. 83) that after questioning her, he lost all confidence that he could ever be comfortable with her in a law enforcement office. He terminated her as his Deputy.

RULE 34(h) COMPLIANCE

SUMMARY OF ARGUMENT

Under Texas law, a Constable appoints a Deputy to assist him in the performance of his duties. The Deputy serves at the pleasure of the Constable. The Deputy is the alter ego of the Constable. In the eyes of the public who elected the Constable, but not the Deputy, the Deputy IS the Constable. The public rightly holds the Constable responsible for whatever the Deputy does.

The Constable is a law enforcement officer of the State of Texas. By force of law, his Deputies are also law enforcement officers. He, and his Deputies, are sworn to preserve, protect, and defend the Constitution and laws of the United States and of this State. Murder is prohibited by all civilized nations and states, as well as by others that are not so civilized. Murder of the President is prohibited by Congressional statute. It is inconsistent for a

Deputy sworn to preserve, protect and defend the Constitution and laws of the United States and Texas to voice a desire for some of those same laws to be violated. The character and honesty of such a person is beclouded, even by talk, in the environment of a law enforcement office. A Constable, with a responsibility to the people who elected him to enforce the laws, cannot have confidence in a Deputy, who is his alter ego to the public, who wants a very heinous crime perpetrated.

RULE 34(i) COMPLIANCE

ARGUMENT

Article 6869, Vernon's Texas Civil Statutes, authorizes a Sheriff to appoint Deputies to continue in office at the pleasure of the Sheriff. A Deputy shall have the power and authority to perform all the acts and duties of the principal. The Deputy is required to take and subscribe to the official oath.

Article 6879a, Vernon's Texas Civil Statutes, authorizes a Constable to appoint Deputies, who shall qualify as required of Deputy Sheriffs. A Constable can appoint ONLY Deputies. We have placed in an appendix to this Brief a copy of Attorney General of Texas Opinion No. O-7081 (1946), which holds that Article 6879a controls the appointment of Deputies by the Constable, that the Deputies serve at the pleasure of the Constable, and that other Texas statutes that authorize County officers (including Constables) to appoint Deputies and assistants is not applicable to a Constable. [In the Re: on page 1 of the Opinion, Article *6897a* is an obvious transposition of Article 6879a, and on page 4 of the Opinion a reference to House Bill *350* is incorrect—the reference on

page 3 of the Opinion to House Bill *850* is correct.] Accordingly, all the appointments of people to assist a Constable in the performance of his official duties are his Deputies. The Constable in a large metropolitan area, such as Houston, has many more demands on his official time than can be supplied by his one body, and necessity compels him to utilize the assistance of many Deputies to accomplish his official duties where and when needed.

A hundred years ago the Supreme Court of Texas wrote of the Deputy relationship with the superior in *Heye v. Moody,* 67 Tex. 615, 4 S.W. 242, 243 (1887):

> . . . (A)s to the public, whose servants these officers are, the acts of the deputy are the acts of the principal. The possession of the former is the possession of the latter. So far as the responsibilities of the office are concerned, the sheriff is liable for the acts both of himself and his deputy. . . .

A half century ago, in the case of *Murray v. Hair,* 112 S.W.2d 1091, 1093 (Tex. Civ. App., Amarillo, 1938, error dism.), it was held:

> . . . Deputies so appointed are vested with duties and powers which involve a public trust, and the responsibility for the proper discharge of duties relating to the public peace and enforcement of the laws of the state rest upon their shoulders in the same manner and to the same extent as they rest upon the shoulders of their principals. . . .

In *McBee v. Jim Hogg County, Texas,* 703 F.2d 834, 839 (5th Cir. 1983), the Court noted that each of a Deputy's actions, as varied as they may be, represent the implementation of policies of the department as a whole.

The principal, as the elected official, is responsible for employing those individuals whose actions will ensure that his policies are carried out.

That case was then heard en banc, *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1017 (5th Cir. 1984). That Court said:

> Relevant to the determination of disruptive effect is the time, place and manner of the political activity. The *Connick* court, for example, noted that the employee in that case used work time and work space, commenting that employee speech that did not do so "might lead to a different conclusion." . . .

While *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980), *cert. den.* 451 U.S. 907, was a Florida case involving a Sheriff, the Court's exposition of the applicable law is equally applicable to a Texas Constable, and particularly to Constable Rankin in the instant proceeding. At page 1186 of the Reporter the Court said:

> . . . A deputy is the sheriff's alter ego and has all the sheriff's sovereign powers, except the power to appoint other deputies. A deputy's actions are those of the sheriff and the sheriff is civilly liable for those actions:
>
> > It is essential to law enforcement in the various counties of the State that the people shall be able to place responsibility upon a particular individual, the sheriff. He and he alone appoints his deputies and is responsible for them. It was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else.

The Courts have always realized that those officers who are engaged in enforcing the law are judged by different standards than are applied to the average citizen. This recognition is aptly stated in *Dixon v. McMullen,* 527 F. Supp. 711 (N.D. Tex. 1981), at page 721:

> . . . The rationale is to insure that those persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law. After all, state police are charged with the enforcement of the law, not for themselves or their clients as in private practice, but for the benefit and safety of people at large. . . .
>
> . . .
>
> Policemen are just simply a special category. Integrity and trust are prerequisites. The law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which never can be re-enacted or reversed. . . .

Garza v. Rodriguez, 559 F.2d 259 (5th Cir. 1977) *cert. den.* 439 U.S. 877 upheld a firing of a probation officer because speech in which he engaged evidenced character traits undesirable in an employee.

This Court has often taken note that police work is an exceptional occupation. *Foley v. Connelie,* 435 U.S. 291, 297 (1978) recognizes some reasons for exceptional treatment of officers.

> A discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex society where police presence is pervasive. The police function fulfills a

most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se,* but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life. Our Constitution, of course, provides safeguards to persons, homes and possessions, as well as guidance to police officers. . . .

. . .

p. 298

. . . That this prophylactic authority is essential is attested by the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations—for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle occupants are armed and embarked on serious criminal conduct.

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of "the common occupations of the community" . . . A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other "common occupations of the community" who exercises no broad power over people generally. . . .

Kelley v. Johnson, 425 U.S. 238 (1976), and *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976), also recognize that the good of the service justifies a stricter course of conduct for the police officer than is justifiable for the average citizen.

At pages 130-131 of the Joint Appendix, the panel of the Fifth Circuit Court of Appeals concluded that Constable Rankin's office has "no direct law enforcement role and none of its deputies are 'on the street.' " That summation is incorrect. The panel is correct in its statement that the PRIMARY mission of the office is the service of process and execution of warrants limited to Class C misdemeanors carrying a maximum fine of $200. The Constable can agree with the Court panel as to the PRIMARY mission of his office, but cannot agree that he and his Deputies do not take any other action as peace officers when necessary. Since Miss McPherson was terminated as his Deputy, Constable Rankin has had to bury his Deputy Al Garza, who just happened to get in the way of a robber's bullet in a local jewelry store. His Deputy, Captain Frank Davis, was out of action for considerable time when he was shot through the door while serving civil process. Captain LeVrier testified (R. Document 22, page 49) that he had been security personnel many times for the President of the United States, since his first experience in 1936 with President Roosevelt. Constable Rankin testified (R. Document 22, page 62) that he was the last officer to shake hands with President Kennedy in Houston the day before he was killed. Constable Rankin was security for Governor Connally in the Kennedy entourage. When President Kennedy was killed Governor Connally was also shot—and the officer acting as his security was killed. One day and 240 miles kept the Constable alive for this instant assault on him. Assassins usually are not world class marksmen. Police officers guarding public figures frequently take bullets intended for the person they are guarding. Hinckley wounded not only President Reagan, but also one of the security

officers guarding the President, and Presidential Aide Brady.

The panel of the Fifth Circuit made much that McPherson's statement did not disrupt the office. That panel was several years and several hundred miles from ground zero. Captain LeVrier was greatly upset over the declaration by McPherson. When she refused to recant, Captain LeVrier disclosed her attitude to the Constable, through channels. After checking her words and attitude with her, the Constable lost all confidence in her acting as his Deputy, and doing his job for him as he himself would do the job if he had that much time.

The Court of Appeals panel deprecates the ministerial duties performed by McPherson and her lack of authority. She was doing the work of the Constable—work he would have to do himself if he did not have trusted Deputies doing it. Not all the Constable's work is shooting or arresting thugs. There is a tremendous amount of paper work involved. Telephones need to be answered. Information needs to be filed, or forwarded, or put into computers. There is no need for all Deputies to be certified Peace Officers. Especially one who is still in her probationary period of look-see. Her conversationalist, Deputy Jackson, was a certified Peace Officer, as was her immediate supervisor. Other computer Deputies were taking classes to become Certified. Being a part of the team, an efficient member, a trusted, capable Deputy, does not require that everybody be certified to wear and use a firearm. It does require that the Constable and all the other Deputies have confidence that all those on whom they depend are in fact dependable doing their job.

In *Morrow v. State,* 140 Tex. Crim. App., 586, 147 S.W.2d 248 (1941), the Court held that a fellow working with piping was doing plumbing work, even though he was not a licensed plumber. A stenographer in a law office taking dictation is doing legal work, but is not enaged in practicing law. A receptionist answering the phone for a dentist is engaged in dental work, but is not engaged in the profession of practicing dentistry.

In the same vein, Constable Rankin's secretary, his telephone receptionists, his computer operators, his file clerks, ALL are his Deputies and are doing his work. A need exists for all of them if he is to do his duty owing to the public. In *Cunningham v. Neagle,* 135 U.S. 1, 55-56 (1890), this Court told that many duties of a Judge are performed outside of the Courtroom. Chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the Courthouse. Performance of Judicial duty consists of more than filing of a judgment and announcing results in open Court.

RULE 34(j) COMPLIANCE

CONCLUSION

The advocacy of violation of National and State laws by the Deputy of the Constable, in open defiance of her oath to preserve, protect and defend the Constitution and laws of the United States and of Texas, caused the Constable to lose confidence in her to be his Deputy and perform his duties assigned to her as he himself would perform those duties. The District Court conducted two trials of this cause and upheld the Constable both times. The Court of Appeals disregarded the findings of the District

Court and made its own independent constitutional judgment on the facts of the case. This was error. The opinion of the Court of Appeals should be reversed and the judgment of the District Court should be affirmed. Constable Rankin so moves the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of December, 1986, I caused a signed true copy of the Petitioners' Brief on the Merits to be placed in the United States Postal Service, with proper postage prepaid, addressed to counsel of record for respondent herein:

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APPENDIX TO BRIEF

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
Attorney General
Honorable Olan R. Van Zandt
County Attorney
Grayson County
Sherman, Texas

Dear Sir:

Opinion No. 0-7081

Re: Does the Commissioners Court have the authority to rescind the appointment of a deputy constable made in compliance with Article 6897a, V.A.C.S., and related quesitons?

From your letter requesting our opinion upon the above captioned matter, we quote in part as follows:

"1st.

Does the Commissioners' Court have the authority to rescind the appointment of a Deputy Constable made in compliance with Article 6879a, Vernon's Annotated Statutes?

"2nd.

The precinct officers of Grayson County, Texas, are on a fee basis. If a Constable in Grayson County fails to petition the Commissioners' Court of Grayson County in January, 1946, under the provisions directed under Article 3902 of Vernon's Annotated

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No communication is to be construed as a departmental opinion unless approved by the Attorney General or First Assistant

Statutes for a Deputy Constable, does his failure to so petition terminate the appointment of his Deputy theretofore authorized by the Commissioners' Court?

"3rd.

The petition to appoint a Deputy and the consent of the Commissioners' Court thereon was for no certain time. At what time in view of the above facts would an appointment be terminated?"

You enclosed a letter to you from J. N. Dickson, County Judge, which reads in part as follows:

"For your information:

Walter Self was duly elected Constable of Justice Precinct No. 6, Grayson County at the General Election of November 7, 1944, and qualified as said Constable on January 1, 1945. Under Article 6879a RCS, said Constable would be entitled to one deputy upon compliance with the statutes in making request therefor. Vo. 5, Page 124 Commissioners' Court minutes of Grayson County has recorded thereon the request of Walter Self for a deputy constable and the Courts approval thereof and reads as follows:

" 'November 1, 1945

Court in Special Session on this the 1 day of November, A.D. 1945,

" 'Whitesboro, Texas
October 20, 1945

"State of Texas
County of Grayson

"To the County Commissioners of Grayson County. This is to certify that I am in need of a deputy Constable to help enforce the law in my Precinct

and would respectfully ask you to appoint J. W. Kanaday as my deputy.

"This appointment will meet the approval of Justice of Peace here.

Walter Self
Constable Prect. 6

"Approved by C. L. Simpson,
/s/ C. L. Simpson'

After due consideration by the Court the above application is granted'.

"In view of the above facts:

"(1) Does the Commissioners Court have authority to rescind the appointment of said deputy Constable, J. W. Kanady?

"(2) The Constable, Walter Self, is compensated by fees of office and not from the Officers Salary fund. If he does not petition the Commissioners Court as provided in Art. 3902 R.C.S. for a deputy Constable for 1946—Would the fact that he did not petition during January 1946 void the deputation of deputy, J. W. Kanady and would he be without authority to act as deputy constable until a request was made to the Commissioners Court and said request approved by the Court?

"(3) The petition to appoint a constable was for no certain time as shown heretofore. At what time, in view of the above facts, would his appointment be terminated?"

Article 3902, V.A.C.S., as amended in 1931 by House Bill No. 434, Ch. 214, reads in part, as follows:

"Article 3902. Whenever the county judge, sheriff, county clerk, county attorney, district clerk, tax collector, tax assessor, justice of peace and *constable*

shall require the services of deputies or assistants in the performance of his duties, he may apply to the county commissioners court of his county for authority to appoint such deputies or assistants, setting out by sworn application the number needed, the position sought to be filled, and the amount to be paid. Said application shall be accompanied by a statement showing the probable receipts and disbursements of the office; . . . ."

This amendment was approved May 26, 1931.

House Bill No. 850, Ch. 280 was passed by the 42d Legislature on the following day. This act was later incorporated in Vernon's Statutes as Article 6879a and 6879b and reads, in part, as follows:

"Section 1. The duly elected constable in each justice precinct having a city or town of less than eight thousand (8000) population according to the preceding Federal census may appoint one (1) deputy and no more; and each justice precinct having a city or town of eight thousand (8000) and less than forty thousand (40,000) population according to the preceding Federal census may appoint two (2) deputies and no more; and in each justice precinct having a town or city of forty thousand (40,000) population or more according to the precering Federal census may appoint five (5) deputies and no more, and each and every instance said deputy constables shall qualify as required of deputy sheriffs.

"Sec. 2. When the constable in each and every instance named and described in the preceding section of this act shall desire to make appointment of a deputy or deputies, as the case may be, said constable shall first make written application to the commissioners court of his county showing that it

> is necessary for such constable to have the deputy or deputies requested in order to properly handle the business of his office originating in the precinct in which such constable has been elected, giving the name of each proposed appointee; and if the commissioners court shall find that the constable is in need of the deputy or deputies requested to handle the business originating in his precinct, then and in that event, and in that event only, the commissioners court shall approve and confirm the appointment of the deputy or deputies provided by this act."

House Bill No. 350 would control over House Bill No. 434 as to the appointments of deputy constables, for the reason that it is a special law dealing solely with such appointments, while House Bill No. 434 is a general law dealing with the appointments of deputies and assistants to county and precinct officers. Further House Bill No. 850 was passed subsequently to House Bill No. 434.

In 1935 at the 2nd called session of the 44th Legislature Senate Bill No. 5, Ch. 465, in placing district, county, and precinct officers on a salary basis, and in prescribing their compensation, amended Article 3902 and therein prescribed the maximum salary to be paid deputies, assistants, and clerks in counties according to various population brackets. The same act, after providing that:

> "In all counties in this State such precinct officers shall continue to be compensated for their services on a fee basis until the Commissioners' Court shall have determined otherwise in accordance with the provisions of Section 2 of this Act." Then provided:
>
> ". . . .
>
> "In counties in which *precinct officers* are paid a *salary* as compensation for their services, such officers desiring to appoint one or more deputies or assistants shall make application to the Commis-

sioners' Court for authority to appoint such deputy or deputies, in the manner and form prescribed for applications for deputy county officers by Article 3902, Revised Civil Statutes 1925, as amended within the provisions of this Act; . . ." (Emphasis added)

Such act further provided:

"(h) Whenever any district or county officer, *or precinct officer when such officer is compensated on a salary basis,* with the exception of district attorneys and criminal district attorneys, shall require the services of deputies, assistants, and employees in the performance of his duties he shall apply to the Commissioners' Court for authority to appoint such deputies, assistants, and employees, stating by sworn application the number needed, the position to be filled, the duties to be performed, and the amount to be paid. Said application shall be accompanied by a statement showing the probable receipts from fees, commissions, and compensation to be collected by said office during the fiscal year and the probable disbursements which shall include all salaries and expenses of said office; and said court shall make its order authorizing the appointment of such deputies, assistants, and clerks and fix the compensation to be paid them within the limitations herein prescribed and determine the number to be appointed as in the discretion of said court may be proper; . . . ." (Emphasis added).

Thus, it is seen that in counties wherein the precinct officers are on a fee basis the provisions of Article 3902 requiring the application for the appointment of a deputy constable to be by sworn application and stating the amount to be paid and accompanied by a statement showing the probable receipts and disbursements of the office, is not applicable, and that in such counties the constable would merely have to follow the provisions of said Article 6879a which provides that the constable shall make

written application to the Commissioners Court of his County showing that it is necessary for such constable to have the deputy or deputies requested in order to properly handle the business of his office.

The case of the Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County (Sup. Ct. of Utah, 1928) 268 Pac. 783, involves the power of the County Commissioners' Court of Salt Lake County to suspend or remove from office deputies of the county against their will and that of the sheriff. In that case the court said:

> "When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal or suspension, unless controlled by statute, is an incident to the power of appointment. In such case the office is held during the pleasure of the authority making the appointment, and in the absence of a statute on the subject no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer. 22 R. C. L. 562-576. The appointment of the deputies here was not for any fixed or stated term or period. What divides the parties is this: The commissioners contend that the appointing power was with them and that they, in legal effect, appointed the deputies, and hence that they had the authority to summarily suspend or remove them at pleasure with or without cause; that the sheriff and the deputies dispute and urge that the power of appointment and summarily to suspend or remove the deputies rested with the sheriff, so long as the office itself was not abolished or that the purpose or necessity for which the deputies were appointed no longer existed, a matter not here claimed or involved. That is to say, the deputies were not suspended or removed for any reason that the purpose or necessity for which they were appointed no longer existed, or had ceased.

"The statute, section 1461, Comp. Laws Utah 1917, provides that 'every county . . . officer . . . may, by and with the consent of the board of county commissioners, appoint as many deputies and assistants as may be necessary for the prompt and faithful discharge of the duties of his office,' . . .

"The sheriff's office is an elective office of the county, as is also the office of a county commissioner, and is a co-ordinate office or branch of our county government. His powers and duties are prescribed by statute and are similar to those generally prescribed by other western states. In performing them, he, generally speaking, acts independently of the board of county commissioners except as otherwise restricted and specified by statute. Except by and with the consent of the board of county commissioners he may not make a binding or completed appointment of a deputy or deputies, and until such consent is had and such deputy has taken the oath of office, he, in law, is not a deputy and may not act or perform official functions or offices as such. While the matter may not be entirely free from doubt, yet we are of the opinion that proper construction and interpretation of section 1461 is that it is the county officer, here the sheriff, who appoints his deputy or deputies, but that such appointment does not become effective or binding until consented to by the board of county commissioners and the person so appointed has taken the oath of office; and therefore, whatever summary power of suspension or removal of a deputy may be exercised is to be exercised by the sheriff and not by the board of county commissioners, . . . Such view is also in harmony with the provisions of the section that 'any officer appointing any deputy shall be liable for all official acts of such deputy,' which is in recognition of the principle 'that those in charge of and responsible for administering functions of government,

> who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint' (Myers v. United States, supra). Certain it is that the board of commissioners is not nor are any of its members in any sense civilly or otherwise liable for the official acts of a deputy sheriff but the sheriff is so civilly liable. . . ."

In the case of Murray v. Harris (Amarillo Court of Civil Appeals, 1938) 112 S.W. 1092, the court said at page 1093:

> "The statute conferring upon the sheriff the power to appoint deputies fixes no definite term of office, but provides that the tenure shall be at the pleasure of the sheriff, which is tantamount to a provision that both the appointment and tenure are discretionary with him . . ."

We therefore answer your questions as follows:

1. The Commissioners Court does not have the authority to rescind the appointment of a deputy constable made in compliance with Article 6879a V.A.C.S. The constable makes the appointment and is the only person who can discharge him.

2. We answer your second question to the effect that the failure of the constable to petition the Commissioners Court in January, 1946 does not terminate the appointment of his deputy theretofore authorized by the Commissioners Court. A deputy constable is appointed for no certain time, serves at the pleasure of the constable, or until the expiration of the term of office of the constable.

3. Your third question is answered to the effect that an appointment made by a constable will only terminate upon the following contingencies:

a. Being discharged by the Constable.

b. At the expiration of the Constable's term of office.

c. By resignation of the Constable.

d. By the death of the Constable.

e. By resignation of the deputy.

f. By death of the deputy.

g. By a judgment of ouster by a district court in a quo warranto proceeding instituted by the County Attorney to test the validity of the appointment.

We trust the above and foregoing fully answers your inquiry.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ W. V. Geppert
W. V. Geppert
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By /s/ David Wuntch
David Wuntch
Assistant

Approved: May 18, 1946

/s/ Carlos Ashley
First Assistant
Attorney General

WVG:ms:lh

This opinion considered and
approved in limited conference.